BUSINESS BRIEFS

Legal Developments Affecting Business

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Choosing Success or Separation – The Power of the "Door Talk" with Long-Term Employees

By Randall P. Sutton

It is easy to feel helpless when dealing with a poor performing employee. Even where there is good cause to terminate, the employment laws give ample opportunity for a disgruntled employee to sue the company. I often find that my clients will tolerate a poor performer and delay the termination decision for too long, fearing that taking any action at all will trigger a lawsuit. In these cases, there is a strategy that harkens back to Monty Hall and the difficult choices contestants made on "*Let's Make a Deal*." We call it the "Door Talk."

Termination Risk Factors

Of course, some terminations are more risky than others. Termination decisions are made the most difficult where the employee has one or more of the following risk factors, which make any termination decision much more complicated:

- Long-term employee who has worked for the company for many years
- Little or no documentation in the file (or only good evaluations)
- Health Issues – Family Medical Leave, on-the-job injuries, and/or absenteeism problems
- The employee is a "pot stirrer," frequently complaining about company practices or management
- The employee is a member of a protected class, such as race, national origin, gender, disability or other protection.

The Dripping Faucet - The Problem of Waiting for the Employee to Fail

Faced with the risks of termination, it can be tempting to take no action and tolerate the problem employee for an extended period of time. Unfortunately, tolerating poor performance is often not sustainable. Eventually, the frustration level can increase, sometimes suddenly, justifying a termination decision that seems rash. It doesn't look right when "the last straw" finally triggers the employer's decision, especially when many greater missteps in the past were poorly documented or ignored entirely.

Sometimes, the employer will simply wait for some future instance that may be sufficiently bad to justify termination. Of course, the longer an employee works for the company, the more it will appear to an outsider that the employee's performance must have been satisfactory over the years. The longer the employer waits, the bigger the error or violation needed to justify termination of the seasoned employee.

"The Door Talk"

When dealing with a tough termination, a powerful technique is to give the employee control over whether or not he or she continues as an employee. The conversation with the employee starts with a

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clear statement that: a) the employee is not meeting standards; b) you really want the employee to succeed; and c) you need the employee's commitment to success:

> "You've been here a long time. For many years, your performance has not met our expectations. We really want you here and we are hopeful that you also want to succeed here. If you are committed to success, then so are we. Here are the standards we are expecting from you going forward."

The expectations you are placing on the employee should be realistic, achievable, and not unlike the expectations you place on similarly situated employees. You've got to mean it, and sell the employee on your desire that they rise to the challenge. The issues you are discussing with the employee should be documented to the extent possible, even if the documentation is created specifically for this particular conversation.

Now, here comes the "Door Talk" part of the conversation:

> "On the other hand, if you are not committed to success, or you are not happy here, then as Door #2, let's work together on a transition to a job that you would prefer to be doing. We are hopeful you don't want to go this route, but if you do, we would like to offer you severance to help you transition to another position."

The "Door Talk" gives the employee an escape route in a moment where they are faced with the dire challenge of improving their performance at risk of being terminated. In some cases, where the employee's heart really isn't in it, the Door Talk allows the parties to talk about a severance strategy.

If the employee elects "Door #2" and would like to transition out of the company, it is critical that the employee sign an attorney-prepared severance agreement. The agreement would include a release of claims, and deal with a variety of issues such as letters of reference, payment of severance, restrictions on what the employee can do or say post-employment, and a variety of other matters.

Our attorneys are happy to assist with difficult terminations. We frequently prepare severance agreements, letters of reference, termination letters and other documentation to assist in the termination process and the reduction of potential exposure to our clients. Please call our office should you need assistance in making or documenting the termination decision.

Protecting Your Trademark Rights

By Eric J. Tweed

In a recent edition of Business Briefs, we discussed what a trademark is and the process of developing and registering a new trademark. In summary, we discussed the fact that a trademark is used to identify the source of goods or services and that the more distinctive the mark, the more likely it is that your rights associated with the mark will be enforceable.

Now let us assume that you have identified a distinctive trademark and performed a search to ensure that no one else is using the mark to identify the goods or services you wish to provide. In addition, you have applied for and obtained registration with the United States Patent and Trademark Office. Federal trademark registration provides the registrant with, among other benefits, the presumption of ownership of the mark, the right to use the mark throughout the U.S., and the ability to stop others from using similar marks for similar products or services. Regardless of whether you have a registration with the Patent and Trademark Office, however, it is important to protect the rights and the goodwill you have developed through your hard work in advertising your goods and services and providing excellent service to your customers.

So how do you protect your rights in the trademark and the goodwill established by your all of your hard work?

Four important things to do are: (i) include the proper notice of your trademark when using it, (ii) make sure the mark stands out from other text; (iii) use the mark exactly as it is registered or intended to be used; and (iv) police your mark and, when necessary, take appropriate steps to enforce your rights in the mark.

Notice

Even if you have not obtained federal registration for your mark, you should always use the TM symbol (goods) or SM symbol (services) next to your mark. These symbols put others on notice that you are using the mark as a trademark and dissuades others from using the mark. If you have obtained federal registration with the United States Patent and Trademark Office, then you should use the ® symbol when using the mark. Using the ® symbol ensures that others are on notice of your federal registration, and failure to use the symbol could mean that you give up the right to recover lost profits or monetary damages in an action to enforce your rights in the mark.

Display Prominently

Displaying your trademark is also important in maintaining your rights. Always ensure that the trademark is separate and stands out from other text, especially if it is a standard character mark and does not include any design elements. Moreover, your trademark should be used on packaging if it is used with a good rather than a service, and not just with advertising or promotional material. Remember, a trademark identifies the source of a good, and proper evidence of use requires use that identifies the good itself, such as labels and display tags.

Use the Mark as Intended

Always use the mark exactly as it is registered or exactly as you intend to use it and always use it as an adjective. *Never* use the mark as a noun or a verb. Doing so could undermine the work you are doing to establish the mark by diminishing the strength and enforceability of your mark. There are many famous examples of marks that have lost their distinctiveness because they were used improperly. Have you ever asked for a Kleenex? Or have you ever Xeroxed something? Both are examples of improper uses of trademarks that have diminished the rights in the trademarks for the owner. The proper use of the above mentioned trademarks would be: "Please give me a Kleenex brand tissue", and "I made copies on the Xerox brand copier." Be careful to avoid having your trademark become synonymous with a thing or an action, or you might risk losing the rights associated with your trademark. Similarly, never pluralize the mark or make it possessive unless such use is part of the mark. For example, you wear "Nike running shoes" as opposed to "Nikes."

Police and Enforce

To ensure that your mark is being used properly, you should always police your mark and ensure that no one else is improperly using the mark or infringing on your rights by using a similar mark. Google alerts or other trademark monitoring services can help you determine if others are improperly using your mark. In the event that you suspect an improper use of your mark, it is important to consider enforcing your rights. Enforcement can begin with a letter to the improper user and can escalate into a legal proceeding. Policing and enforcing your trademark rights helps ensure that you maintain the rights in your mark and the goodwill that you establish in the mark through its proper use.

As many of you may know, we have experienced trademark attorneys in the firm who can assist you with the trademark process, both before and after registration. On October 25 our trademark attorneys will host a breakfast seminar at our office geared toward helping our clients with their trademark needs. If you are interested in attending this seminar, please contact Teresa Green at tgreen@sglaw.com.

Estate Planning Trivia: Eleven Things You Didn't Know About Wills

P. Freeman Green

Here are eleven fun facts that you may not know about wills:

1. **100% of Oregonians Have a Will**. Believe it or not, everyone has a will. If you have not created your own will, Oregon's laws of intestacy will fill the void. These laws function like a default will that applies when a validly executed will cannot be found. However, the will that Oregon law creates for you may not match your desires.

2. You May Have to Split Your Spouse's Estate with Your Stepchildren. For decedents who did not create a will of their own, the terms of Oregon's default will differ depending on whether the decedent's spouse is the parent of the decedent's children. For decedents whose children are also the children of the decedent's spouse, Oregon's will leaves all property passing by the will to the surviving spouse. However, for decedents who have children that are not the children of the decedent's spouse, only half of the property passing by will transfers to the decedent's spouse. The other half of the property transfers equally to the decedent's children who are not related to the decedent's spouse.

3. Marriage Automatically Revokes a Will. Unless a will expresses intent to the contrary, the act of marriage automatically revokes any will previously signed by the newlyweds.

4. In Oregon, a Will Must Be Signed by Two Witnesses to be Valid. If a will is not signed by the person creating the will along with two separate witnesses, the document is not a valid will under Oregon law. Notarization of the document alone is not sufficient to create a valid will.

5. Invalid Wills May be Treated as a Will if the Probate Court Approves. In cases where a person attempted to create a will, but failed to meet Oregon's statutory will requirements (such as the two-witness requirement), a probate court proceeding can be held to determine whether the decedent intended the document to be his or her will. If sufficient proof is presented to the court and proper procedures are followed, the court may allow the document to be treated as though it were a valid will.

6. There is No Required "Reading of the Will" After Death. Remember the movie scene where a decedent's family sits down in a formal meeting and listens while the decedent's attorney formally opens and reads the will aloud? In the real world, it rarely happens that way, and it is certainly not required. Although families often request a meeting with the attorney to review and discuss the estate plan and after-death administration steps, it is rare to verbally read a will or trust aloud in a formal meeting.

7. A Will Must Be Subject to a Probate Court Proceeding to Transfer Property. A will, in and of itself, does not transfer property or authorize the nominated personal representative ("executor") to act. The will must first be filed with a probate court. The probate court then appoints the personal representative and, when the time is right, grants authority to transfer the probate property to the rightful recipients.

8. A Valid Will May Not Control Your Property. Even if a will is valid it does not affect assets with a joint owner or a proper beneficiary designation that is in place. A will also does not affect property held in a trust.

9. Probate is Optional. Interested in avoiding probate? As stated above, a will and a probate court proceeding only control a decedent's assets that lack: (1) a joint owner, (2) a named beneficiary, or (3) ownership by a trust. Although joint ownership will avoid probate of an asset on the death of the first owner, keep in mind that the asset will be subject to probate at the death of the last surviving owner. In addition, joint ownership can have unintended gift tax and creditor consequences. For this reason, use of beneficiary designations and trusts are generally the recommended methods for avoiding probate.

10. Sign a Will (Even If You Plan to Avoid Probate). Are you planning to structure your estate to avoid a court probate? You should still sign a will that meets your wishes. Probate can happen unexpectedly. Financial companies can lose beneficiary designation forms. A joint owner or named beneficiary can pass away with you in a common accident. An inheritance, or other asset, can be in the process of transferring to you at the time of death. Having a will in place will help ensure your wishes are met, even if the unexpected happens.

11. Use a Will to Nominate a Guardian for Minor Children. Oregon law allows parents to nominate a guardian for a minor child. The guardian's role is to assume parental responsibilities for the minor child in the event the parents become incapacitated or die. Oregon law does not require parents to use any particular document or form to nominate a guardian. Guardian provisions are often drafted into a will, as opposed to other estate planning documents. One reason for this is that the will is the most strongly witnessed document of all the estate planning

documents. Most estate planning documents are either signed by two witnesses or are notarized, but not both. The will is the only estate planning document that is commonly witnessed by two separate people, both of whom have their witnessing signatures notarized.

Wills are an important estate planning tool. An accurate understanding of the uses, benefits, and limitations of a will can help avoid unintended estate planning consequences.

Receiverships as a Potential Tool for Creditors of Marijuana Related Businesses

By Joshua D. Feil

It is difficult to drive around any town in Oregon without noticing the amount of marijuana dispensaries that have cropped up all over the state. Since Oregon legalized marijuana in 2014, the number of licensed growing facilities, processors and dispensaries continue to increase. Given how the industry has grown, several of you may be in business with marijuana-related businesses ("***MRBs***"), for example, by leasing property to them or by loaning them money. If you are doing business with an MRB, then at one time or another, an MRB may owe you money. As the recreational market stabilizes, it is possible that some of these MRBs will likely run into financial trouble and even fail.

However, marijuana's continued illegality under federal law and its intensive state regulation mean that there is a risk that, as a creditor of an MRB, you may have limited remedies to collect any money owed to you. You cannot seize and sell the main asset of an MRB—its inventory—or collect income from the sale of marijuana unless you have a proper license from the Oregon Liquor Control Commission ("***OLCC***"), which oversees recreational marijuana licensing in Oregon. Furthermore, cash businesses are difficult to collect against, and because of federal restrictions on MRBs' ability to use banks, MRBs are cash businesses. Until recently, Oregon had not revised its laws to account for this. Additionally, because federal courts have ruled that MRBs cannot file for bankruptcy, creditors cannot receive any protection under federal bankruptcy laws.

A possible solution for a creditor would be use of a receiver—a court-appointed third party with power to oversee the MRB, manage its business, sell its assets, and make payments to creditors. The recently-passed Senate Bill 899A (2017) (the "***Bill***"), which rewrote and revamped Oregon receivership law, likely enhances the receiver's effectiveness in collecting against an MRB. As explained in last quarter's issue of Business Briefs, starting January 1, 2018, receiverships will be easier to obtain and will be more effective tools when dealing with issues that arise when any debtor is not paying.

The Bill gives courts greater guidance with regard to the appointment of receivers and the receivers' powers. The Bill is similar in some ways to the U.S. Bankruptcy Code, in that it provides for an automatic stay (in some circumstances) and provides a process for obtaining court approval to pay the creditors' claims against the debtor. It further allows a receiver to continue operating a business and, with court approval, to sell assets to obtain greater liquidity.

How might the Bill solve some of the issues a client may face when dealing with an MRB? Because the Bill has not become law yet, it is not completely clear. The OLCC has at least anticipated the possible use of a receiver for a licensed MRB in its regulations. However, how the OLCC handles the receivership remains to be seen.

Because the Bill's drafters drew on Washington's receivership statute in revising and clarifying Oregon receivership law, we can get some idea of how creditors might use receiverships by looking to their use in similar situations in Washington. The Washington State Liquor and Cannabis Board ("***WSLCB***"), the Washington equivalent of the OLCC, similarly has regulations referencing receiverships. Law firms representing creditors, judgment creditors and/or landlords of MRBs in Washington worked closely and communicated often with the WSLCB throughout the receivership process, including for selection of the actual receiver. By communicating and cooperating with WSLCB, the attorneys preserved the judgment debtor's marijuana license throughout the receivership and managed to collect on their clients' judgments against the MRB.

The OLCC's regulations are even more detailed about the ability of a receiver to take control of and operate a MRB than are the WSLCB's. OLCC regulations suggest that an Oregon receiver would be able to temporarily

operate an MRB for purposes of "orderly disposition of the business." Therefore, while not entirely certain, it seems likely that a creditor will be able to use the new receivership law in collection efforts against MRBs. Similarly to how the Washington attorneys worked with the WSLCB, cooperation and communication with the OLCC would be essential in ensuring compliance and navigating the receivership process when an MRB is involved.

At the very least, the Bill should provide protections in a state court receivership proceeding against an MRB similar to those of the U.S. Bankruptcy Code. Through the receivership, the court would oversee either a liquidation of the MRB or its continued operation until either the MRB or its assets can be sold. The receiver, under its court-given powers and the OLCC regulations, would liquidate the inventory or continue to operate using the business's license to maximize return on the inventory or otherwise to wind down the business. The court would then manage creditor claims against the MRB and payment of those claims as the MRB and/or its assets are liquidated.

This area of the law is still developing. It is possible that the OLCC might issue new complementary and/or supplemental regulations in response to the new receivership statute. Our lawyers will continue to track developments and updates to Oregon's receivership process and law and its potential use and benefit to our clients.

FIRM ANNOUNCEMENTS AND SEMINARS

We are pleased to announce that **Hunter Emerick, Randall Sutton, and Erich Paetsch** are the firm's newest additions to ***Best Lawyers in America*** for their areas of practice.

On July 8th, Saalfeld Griggs' Agri-Business Industry Team proudly sponsored and attended the **Marion County 4-H Junior Livestock Auction & Rough Stock Rodeo.**

From July 12th to 14th, members of Saalfeld Griggs' Finance Industry Team attended the **OBA/WCA Summer Convention.**

On July 28th, Saalfeld Griggs sent two teams to play in the **MCBA Val Sloper Golf Tournament at Salem Golf Club.**

On August 25th and 26th, members of Saalfeld Griggs' Health Industry Team attended the **Mullins Charitable Dinner** and participated in the **Samaritan Golf Scramble at Mallard Creek Golf Course.**

On September 13th, Saalfeld Griggs sponsored **SEDCOR's 2017 Annual Awards Celebration** at the Salem Convention Center.

On September 15th, Saalfeld Griggs' Dental Industry Team sponsored a hole at the **OHSU Dental School Cantwell Golf Tournament.**

On September 18th, Saalfeld Griggs sent two teams to play in the Salem Area Chamber of Commerce **5th Annual McLaran Classic Golf Tournament** held at **Illahe Hills Country Club.**

On September 19th, Randy Cook spoke at the Oregon State Bar's **Mid-Valley Tax Forum** luncheon. The topic of his presentation was **Cash Balance Plans & Retirement Plan Update**.

On September 23rd, Saalfeld Griggs sponsored the **Gilbert House Children's Museum "Discover the Wonder"** dinner and fundraiser at the **Northwest Viticulture Center**.

On September 28th, Saalfeld Griggs hosted the **8th Annual Celebrating Women in Business Event**. The keynote speaker at the event was Debra Ringold, Dean and JELD WEN Professor of Free Enterprise in the Atkinson Graduate School of Management at Willamette University.

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